



# Bond and Custody

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Immigration Judge  
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# Bonds Mean the World



# Bonds Mean the World to the People in Your Courtrooms

- Release on bond may mean a respondent will be able to obtain counsel and better prepare for relief.
- Inability to post bond may mean a respondent's spouse, parents, and children (whether U.S. citizens or not) must move, accept public assistance, drop out of school, or even lose their homes.
- Of course, release on bond may mean that a respondent will effectively be able to remain in the U.S. for many years due to the extensive backlog on non-detained dockets.
- In short, always keep in mind the importance of bond as you listen to respondents and apply the law. This is a big moment for people.

# ICE Detention Authority: the Big Picture



# ICE Detention Authority

- ▶ A number of statutory provisions give ICE the authority to detain aliens.
- ▶ In some circumstances, detained aliens have a right to a bond hearing before an Immigration Judge.

# Port of Entry/ Expedited Removal



# INA § 235 - Detention of Arriving Aliens and Aliens Subject to Expedited Removal

- An applicant for admission (“arriving alien”) who an immigration officer has determined is not “clearly and beyond a doubt” entitled to be admitted “shall be detained” for a proceeding under INA § 240 (removal proceeding).
  - INA § 235(b)(2)(A).

**INA § 235 - Detention of  
Arriving Aliens and Aliens Subject to Expedited Removal  
(continued. . .)**

- Aliens subject to expedited removal “shall be detained” pending a credible fear determination, and if no credible fear, until removed.
  - INA § 235(b)(1)(B)(iii)(IV).
- Through Federal Register designation, aliens subject to expedited removal include those encountered within 100 miles of any international land border and who have not established physical presence for 14 days prior to the date of encounter.
  - See 8 C.F.R. § 235.3(b)(1).
- Parole may be available through DHS for arriving aliens and aliens subject to expedited removal.

# Parole (Not for You!)

- Certain arriving aliens may be paroled into the United States for “urgent humanitarian reasons,” or for “significant public benefit,” provided the alien presents neither a security risk nor a risk of flight.
  - INA § 212(d)(5); 8 C.F.R. § 212.5(b).
- Parole of aliens subject to expedited removal is permitted as a matter of discretion when it is required to meet a medical emergency, or it is necessary for a legitimate law enforcement objective.
  - 8 C.F.R. § 235.3(b)(2)(iii).

# INA § 235(b)(1) - Aliens Subject to Expedited Removal But Found to Have a “Credible Fear”

- Aliens subject to expedited removal but subsequently placed in § 240 proceedings after being found to have a credible fear of persecution or torture may seek a custody redetermination by the IJ. *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005). You will see an NTA in these cases.
- BUT on October 12, 2018, the Attorney General issued a decision taking up *Matter of M-S-*, which will address whether *Matter of X-K-* should be overruled. That case is pending.

# INA § 236!

## The Core of the IJ's Bond Authority!



# INA § 236 - Pre-Final Removal Order Detention

- ▶ INA § 236 governs detention during removal proceedings, essentially before a removal order becomes final.
- ▶ The bulk of an IJ's bond decisions will involve detention under INA § 236(a) and INA § 236(c).

# INA § 236(a) and (c)

- “On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.”

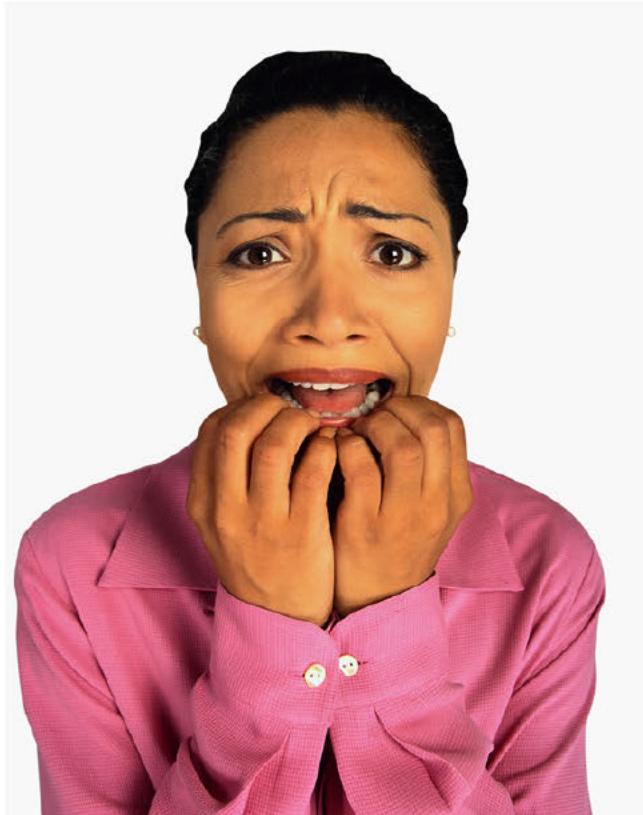
- **§ 236(a) – Discretionary Detention**

- Provides authority for an alien to continue to be detained, released on a “bond of at least \$1,500,” or released on “conditional parole.” Requires a consideration of whether an alien presents a danger to persons or property, is a threat to national security, and/or poses a risk of flight. *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999)

- **§ 236(c) - Mandatory Detention**

- Provides for mandatory detention of certain<sup>13</sup> classes of criminal aliens. See also *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999)

# Don't Worry -We'll Get Back to This in More Detail



# INA § 241 - Post-Final Removal Order Detention

- ▶ Creates a 90-day removal period during which an alien shall be removed from the United States.
- ▶ The removal period begins with the LATEST of the following:
  - The date the order of removal becomes administratively final;
  - If a petition for review (PFR) and a stay is issued, the date of the circuit court's final order; or
  - If the alien is detained or confined (except under immigration process), the date the alien is released from detention or confinement.
- ▶ Detention during the removal period is **mandatory**. (*But see* case law developments in your circuit and others in this hot area.)
- ▶ Post-removal period detention/release provided for in 8 C.F.R. § 241.

# Bond Hearing Basics

- ▶ The bond hearing is *separate and apart* from, and shall form no part of, the removal proceedings. 8 C.F.R. § 1003.19(d). Practices vary, and eROP is underway. DAR recordings must be separate.
- ▶ The purpose of bond is to ensure that the alien will return to court if released from detention (and that a dangerous or potentially dangerous alien is not released).
- ▶ Immigration bonds must typically be paid in full.
- ▶ If the alien fails to appear following release on bond, the bond is forfeited and the Immigration Judge orders the alien removed *in absentia*.
- ▶ There is no statute of limitations for DHS/ICE to take an alien into immigration custody following the alien's release from criminal detention.

*See Sylvain v. Att'y Gen'l, 714 F.3d 150 (3d Cir. 2013).*

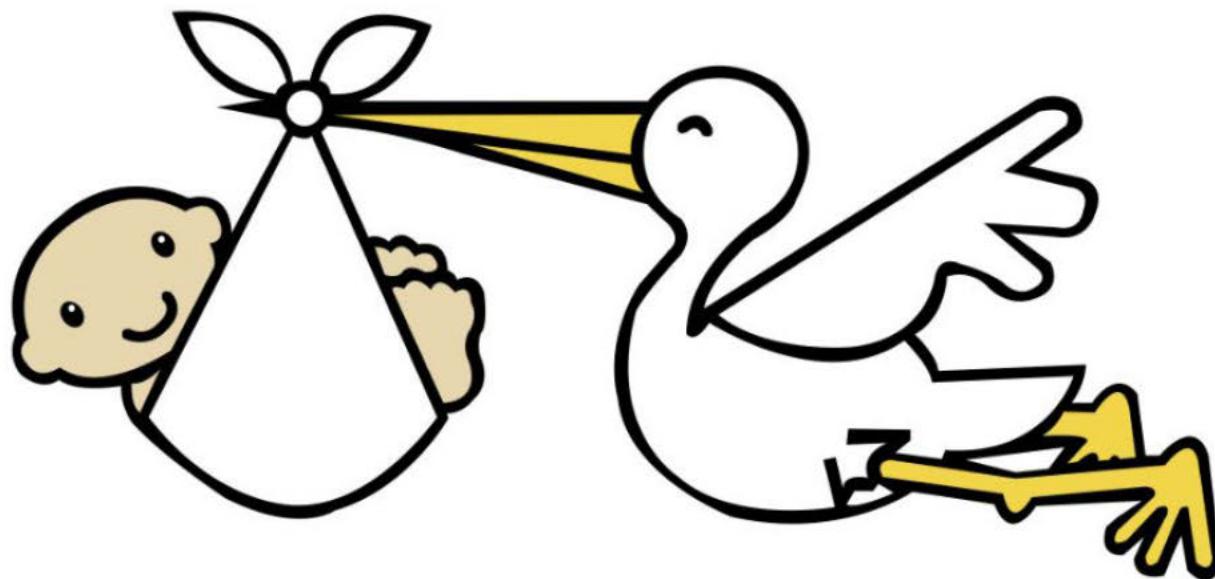
# Bond Hearing Basics

- ▶ A bond hearing will usually be held in the location where the alien is detained. 8 C.F.R. § 1003.19(c).
- ▶ No NTA need be filed for a bond hearing to be requested and conducted. *Matter of Sanchez*, 20 I&N Dec. 223 (BIA 1990).
- ▶ A bond hearing may be held in one location, such as where the alien is detained, even though there is a pending removal proceeding in another Immigration Court.

# Initial Bond

- DHS (ERO) makes the initial custody determination on Form I-286, Notice of Custody Determination.
- 8 C.F.R. § 1236.1(d)(1); 8 C.F.R. § 1003.19.
- DHS determines whether the alien is:
  - Detained in custody,
  - Released on bond,
  - Released with electronic monitoring, or
  - Released on own recognizance.

# Where do Bond Hearings Come From?



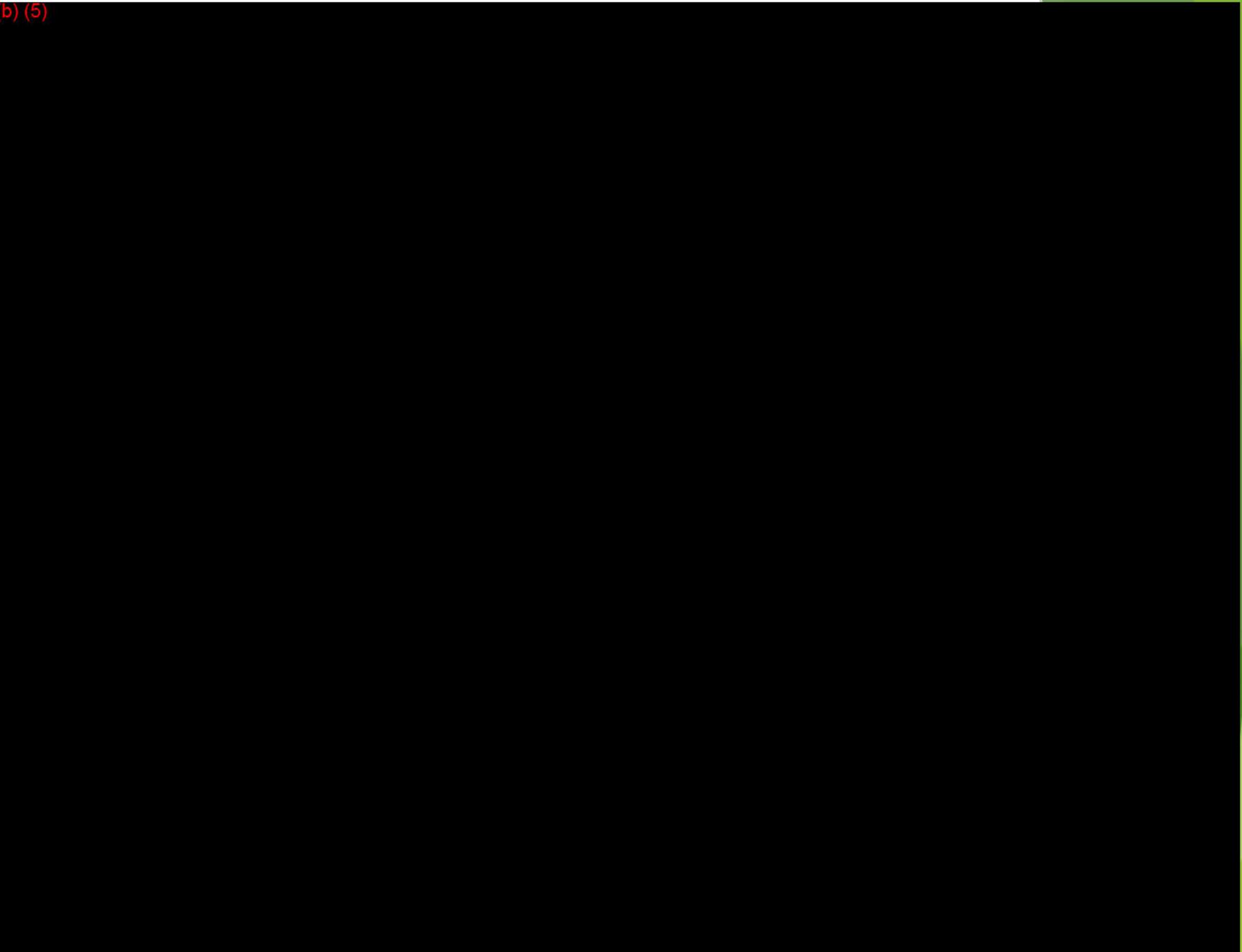
# How Do Bond Hearings Get on the Court's Docket?

- Alien requests redetermination (noted on Form I-286) or through other request (oral or written).
- Alien's attorney files written request for redetermination, sometimes before an NTA is filed with the court.
- After an initial bond redetermination, subsequent requests must be made in writing and show that the alien's circumstances have changed materially since the prior bond hearing. 8 C.F.R. § 1003.19(e).<sup>20</sup>

# Docketing Practices and IJ Preferences on Order of Handling Bond v. Removal Proceedings

- ▶ Some IJs hear bond hearings on specialized bond-only dockets, while many IJ's handle bond hearings during the same master calendar sessions as the removal proceeding.
- ▶ You will need to decide whether to go on the record in the bond hearing first or in the removal proceedings.
- ▶ Practices vary widely, and you may want to try different approaches to determine what works best and is most efficient for you.

(b) (5)



# What Happens at a Bond Hearing?

- Alien and DHS present evidence and argument.
- IJ must be prepared to identify any jurisdictional issues:
  - Mandatory custody (INA §§ 235(b), 236(c)).
  - Final order of removal (INA § 241(a)).
  - Arriving alien.
- If none, then IJ must determine whether to detain the alien as a matter of discretion under INA § 236(a), typically considering dangerousness and flight risk, or whether to set bond at a particular level.
- Court provides brief oral basis for the decision and completes and signs the bond order. (A bond memo, of any, will be prepared later, following the filing of a notice to appeal.)

# Does the Court Have Jurisdiction to Redetermine Custody?

- An alien detained by the DHS may file a motion for a bond redetermination at any time before an order of removal becomes final. 8 C.F.R. § 1236.1(d)(1).
- Immigration Judge's bond authority begins once DHS has taken the respondent into custody and made an initial bond determination. *Matter of Sanchez*, 20 I&N Dec. 223 (BIA 1990); 8 C.F.R. § 1236.1(a); 8 C.F.R. § 1003.14(a).
- Immigration Judge's bond authority generally ends with the issuance of a final administrative order of removal. 8 C.F.R. § 1236.1(d).

# Does the Court Have Jurisdiction to Redetermine Custody?

- A final administrative order or final determination is defined as a “decision from which no appeal or writ of error can be taken.” *Padash v. INS*, 358 F.3d 1161, 1170 (9th Cir. 2004) (quoting *Black’s Law Dictionary* 696 (6th ed. 1990)).
- Under INA § 101(a)(47)(B), a removal order becomes final upon the earlier of (i) a determination by the BIA affirming the order; or (ii) the expiration of the period for appeal.
- The Immigration Court continues to have bond authority even if the removal proceedings are terminated if DHS takes an appeal because the respondent remains a subject of the removal proceedings. *Matter of Valles*, 21 I&N Dec. 769, 773-74 (BIA 1997).
- If the respondent accepts a removal order or a VD order and waives appeal, the court no longer has jurisdiction<sup>25</sup> to set bond.

# Does the Court Have Jurisdiction to Redetermine Custody?

- The court does not have jurisdiction to redetermine an alien's custody where the respondent is subject to mandatory detention.
  - INA § 236(c)(1); 8 C.F.R. § 1003.19(h)(2)(i)(D)
- The court does not have jurisdiction to set a bond for an arriving alien.
  - *Matter of Oseiwusu*, 22 I&N Dec. 19 (BIA 1998)

# Does the Court Have Jurisdiction to Redetermine Custody?

## Other “no jurisdiction” situations:

- Alien is not in ICE custody.
- Alien is in Asylum Only proceedings.
- Alien is admitted pursuant to the Visa Waiver Program and has not been served with a Notice to Appear.
- Aliens that have been arrested pursuant to a prior removal order that has been reinstated by DHS.
- Aliens detained under INA § 235(b).
- Alien makes no request (IJ’s own motion).<sup>27</sup>

*See Matter of P-C-M-, 20 I&N Dec. 432 (BIA 1991).*

# Mandatory Detention Under INA § 236(c)

The Attorney General shall take into custody any alien who is:

- (A) Inadmissible by reason of having committed any offense under INA § 212(a)(2) (criminal grounds).
- (B) Deportable by reason of having committed any offense under INA:
  - § 237(a)(2)(A)(ii) (multiple CIMTs)
  - § 237(a)(2)(A)(iii) (aggravated felonies)
  - § 237(a)(2)(B) (drug offenses)
  - § 237(a)(2)(C) (firearms offenses)
  - § 237(a)(2)(D) (misc. crimes)

# Mandatory Detention Under INA § 236(c)

The Attorney General shall take into custody any alien who is:

- (C) Deportable by reason of having committed any offense under INA § 237(a)(2)(A)(i) (one CIMT within 5 years of admission) and sentenced to greater than 1 year.
- (D) Inadmissible under INA § 212(a)(3)(B) (engaging in terrorist activities or removable under INA § 237(a)(4)(B) (presents a national security threat and/or engaging in terrorist activities)).

# Mandatory Detention Under INA § 236(c) Applies if:

- Alien must have been “released” from non-DHS custody on or after the expiration of the Transition Period Custody Rules on October 9, 1998. *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999).
  - 8 C.F.R. § 1003.19(h)(1)-(2); *see also* TPCR.
- Even if an alien is released before 1998, an alien can only be detained if the alien is arrested and convicted of an offense that would trigger mandatory detention under INA § 236(c).
  - *Matter of Garcia-Arreola*, 25 I&N Dec. 267 (BIA 2010).
- “Release” from criminal custody must be for an offense enumerated in the mandatory custody provisions of INA § 236(c)(1)(A)-(D).
  - *Matter of Garcia-Arreola*, 25 I&N Dec. 267 (BIA 2010).
- “Custody” is satisfied merely by the initial arrest for booking/processing.

# Mandatory Detention Under INA § 236(c)

- ICE need not take alien into custody immediately upon “release” from criminal custody. *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001).
- A circuit split has developed on whether to give deference to *Matter of Rojas*.
  - *Compare Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015); *Olmos v. Holder*, 780 F.3d 1313 (10th Cir. 2015); *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012) (deferring to the BIA); *Sylvain v. Att'y Gen. of U.S.*, 714 F.3d 150 (3d Cir. 2013) with
  - *Preap v. Johnson*, Nos. 14-16326, 14-16779, D.C. No. 4:13-cv-05754-YGR (9th Cir. Aug. 4, 2016); *Casteneda v. Souza*, 810 F.3d 15, 18-19 (1st Cir. 2015) (en banc); *Khoury v. Asher*, 3 F.Supp.3d 877 (W.D. Wash. Mar. 11, 2014) (rejecting *Matter of Rojas*).

# Mandatory Detention Under INA § 236(c)

- Alien need not be charged with the ground of removability making section 236(c) applicable. *Matter of Kotliar*, 24 I&N Dec. 124 (BIA 2007).
- A conviction record is not necessarily required.
  - 8 C.F.R. § 1003.41.
- Although DHS may believe that an alien is removable under one of the mandatory detention grounds, neither the IJ nor the BIA is bound by this determination. The IJ has authority to determine the court's jurisdiction and, if warranted, to redetermine the custody conditions imposed on the alien.
  - *Matter of Joseph I*, 22 I&N Dec. 660 (BIA 1999), clarified in *Matter of Joseph II*, 22 I&N Dec 799 (BIA 1999).

# Mandatory Detention & *Matter of Joseph*

- Immigration Judges have jurisdiction to determine whether an alien is subject to mandatory detention. INA § 236(c)(1); 8 C.F.R. § 1003.19(h)(2)(ii); *see also Matter of Joseph II*, 22 I&N Dec 799 (BIA 1999).
- Proceedings in which the alien challenges whether he or she is subject to mandatory detention are sometimes called *Joseph* hearings, but do not actually require a separate hearing.
- Under *Joseph*, the alien bears the burden to establish that he or she is not “properly included” in a mandatory detention category under INA § 236(c)(1)(A)-(C) by showing that it is “substantially unlikely” that DHS will prevail on the removal charge that establishes an offense under INA § 236(c)(1).  
*Matter of Joseph II*, 22 I&N Dec. at 806-08.

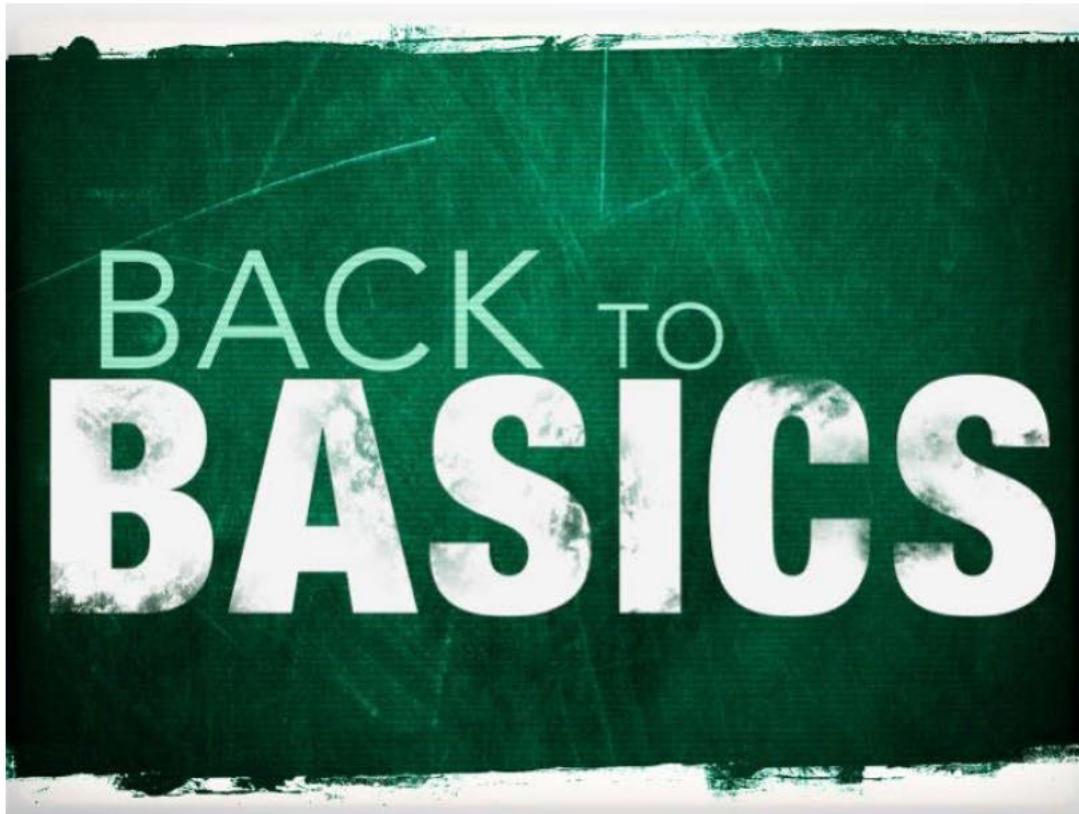
# Mandatory Detention & *Matter of Joseph*

- Where the potential removal charge argued to subject an alien to mandatory detention has not in fact been charged, the IJ must examine whether the evidence submitted demonstrates that the alien committed an offense covered under the mandatory detention provisions. *See Matter of Kotliar*, 24 I&N Dec. 124, 126 (BIA 2007).

# Arriving Aliens & *Matter of Joseph*

- Arriving aliens and aliens in exclusion proceedings are not entitled to a *Matter of Joseph* hearing or assessment by the Immigration Judge as to whether the DHS has correctly determined that an alien is an arriving alien. *See Matter of Oseiwusu*, 22 I&N Dec. 19 (BIA 1998).

# 236(a) - the Crux of Most Bond Hearings



# Section 236(a) of the Act

## a) Arrest, detention, and release

On a warrant issued by the Secretary of Homeland Security, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Secretary of Homeland Security or the Attorney General--

- (1) may continue to detain the arrested alien; and
- (2) may release the alien on--
  - (A) bond of at least \$1,500 with security approved by, and containing conditions prescribed by, the Secretary of Homeland Security or the Attorney General; or
  - (B) conditional parole...

## 8 C.F.R. § 1236.1(d)(1)

Under 8 C.F.R. § 1236.1(d)(1), the Immigration Judge has the authority to:

- detain the alien in custody,
- determine the amount of bond, if any, under which the respondent may be released.

(Note that the regulations do not reference a minimum bond amount!)

# INA § 236(a)

## Burden of Proof

- Generally, the alien bears the burden of demonstrating that the alien:
  - (1) is not a danger to the community; and
  - (2) is not a flight risk.
    - 8 C.F.R. § 1236.1(c)(8); *Matter of Urena*, 25 I&N Dec. 140 (BIA 2009).
- The burden of proof shifts to the DHS in special types of bond hearings (*Rodriguez*, *Casas*, *Franco*, etc.).

# Discretionary Detention

- In determining an alien's custody status or bond, the court will consider:
  - any information that is available to the court on the record; or
  - any evidence presented to the court by the alien or by the DHS.

8 C.F.R. § 1003.19(d); *see also Matter of Guerra*, 24 I&N Dec. at 40-41 (“Any evidence in the record that is probative and specific can be considered.”).

# Discretionary Detention

- All evidence submitted during bond hearings is **separate and apart** from any evidence submitted in the removal proceeding. [8 C.F.R. § 1003.19\(d\)](#).
  - There is no “commingling” of evidence – records of proceeding (ROP) remain separate even if the documents are contained in the same file. *Court practices vary, and eROP is evolving.*
  - The court may consider evidence filed in bond proceedings in the merits proceedings only if it is re-submitted by the parties and received by the court in the removal record.

# Factors Considered by the Court

## *Matter of Guerra, 24 I&N Dec. 37, 40 (BIA 2006):*

- (1) Whether the alien has a fixed address in the United States;
- (2) The alien's length of residence in the United States;
- (3) The alien's family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future;
- (4) The alien's employment history;
- (5) The alien's record of appearance in court;
- (6) The alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses;
- (7) The alien's history of immigration violations;
- (8) Any attempts by the alien to flee prosecution or otherwise escape from authorities; and
- (9) The alien's manner of entry to the United States.

# Broad Discretion

- ▶ An Immigration Judge has broad discretion in making custody redeterminations, and the Immigration Judge may choose to give greater weight to one factor over others, as long as the decision is reasonable. *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

# Dangerousness

- Aliens not subject to mandatory custody must demonstrate that the alien is not a danger to persons or property. *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).
  - The IJ may consider any direct or circumstantial evidence of dangerousness, including whether the facts or circumstances present national security considerations. *Matter of Fatahi*, 26 I&N Dec. 791, 794 (BIA 2016).
  - The IJ may consider uncharged conduct, as well as arrests that did not lead to convictions. The IJ is not limited to considering only documents that comprise the record of conviction for purposes of determining removability.

# Dangerousness

- ▶ Only once an alien establishes that the alien would not pose a danger to property or persons is it proper for an Immigration Judge to consider setting a bond. *See Matter of Urena*, 25 I&N Dec. 140 (BIA 2009). If an alien is a potential danger to the community, then no bond should be set. *Id.*
- ▶ Driving under the influence is a significant adverse consideration in determining in bond proceedings whether an alien is a danger to the community. *Matter of Siniauskas*, 27 I&N Dec. 207 (BIA 2018).

# Flight Risk

- ▶ Much evidence and assessment under INA § 236(a) concerns risk of flight. Amount of bond may sometimes be thought of as the amount needed to ensure, in the context of a given case, that the alien will appear for future immigration court proceedings.
- ▶ The Ninth Circuit has held that the IJ must consider ability to post bond as well as alternative conditions of release in setting a bond amount and making custody determinations. *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017).

# Handling the Hearing: Allowing Testimony vs. Relying on Statements and/or Proffers

- ▶ You will need to consider when and to what extent to allow testimony, as bond hearings are typically interspersed through a busy master calendar docket.

- ▶ (b) (5)

# Examples of Evidence Presented by DHS at Bond Hearings:

- Arrest and Conviction Records, including indictment, complaint, and Pre-sentence Investigation Reports.
- Identification Documents or Fraudulent Documents Used.
- Sworn Statements and Records of Deportable/Inadmissible Alien (Form I-213).
- Witnesses.
- Record of Appearance in Court - Failures to Appear, Bench Warrants, Bail Jumping, etc.
- Special Interest or Operation Cases.
- History of immigration violations and manner of entry.

# Examples of Evidence Typically Presented by the Alien

- Availability and strength of relief from removal.
- Proof of residence: length, fixed nature, stable, and safety.
- Family and community ties.
- Good moral character.
- Employment and financial ties.
- Rehabilitation following any criminal activity.
- Membership in churches and other community organizations.
- Letters of support from friends and family.

# Bond Decisions

- Possible bond decisions:
    - Custody status remains the same. (Request denied.)
    - Bond reduced to a particular amount.
    - Bond increased to a particular amount.
    - Bond revoked.
    - Other conditions imposed.
    - “No action.”
  - The Immigration Judge must:
    - (1) enter the custody or bond determination on the appropriate form at the time the decision is made; and
    - (2) inform the parties orally or in writing of the basis for the bond decision.
- 8 C.F.R. § 1003.19(f).

# Bond Redetermination Following an Initial Bond Hearing

- Following an initial bond hearing, an IJ may reconsider a bond redetermination if:
  - (1) the request is made in writing; and
  - (2) the alien has shown the alien's circumstances have changed materially since the prior bond redetermination.  
8 C.F.R. § 1003.19(e).
- An Immigration Judge, however, may not *sua sponte* redetermine bond status.
  - *Matter of P-C-M-*, 20 I&N Dec. 432 (BIA 1991).

# Bond Appeals

- ▶ Bond determinations made by an Immigration Judge may be appealed by either party to the Board of Immigration Appeals (BIA) within 30 days of the Immigration Judge's order. (Remember to advise the alien of the right to appeal the bond determination and ensure that *pro se* respondents are provided with the appeal packet.)
  - 8 C.F.R. §§ 1003.38; 1236.1(d)(3).

# Bond Appeals

- ▶ Immigration Judges are required to write a bond memorandum only if requested specifically by the BIA on an appeal. As a practical matter, the request may come many weeks after the bond hearing.
  - *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999)
- ▶ A Bond Memo should include:
  - the procedural history of the case;
  - a brief summary of the evidence considered by the court; and
  - legal analysis.

# Electronic Monitoring and Alternatives to Detention (ATD or ISAP)



# Electronic Monitoring and Alternatives to Detention (ATD or ISAP)

- An alien who has been released from detention by the DHS with conditions requiring an electronic monitoring device and home confinement, has been “released from custody” within the meaning of 8 C.F.R. § 1236.1(d)(1).  
*Matter of Aguilar-Aquino*, 24 I&N Dec. 747 (BIA 2009).

# Amelioration of the Terms of Release

- If an alien files an application with the Immigration Judge to ameliorate the terms of release within 7 days of the alien's release from custody by the DHS, the Immigration Judge has jurisdiction to review and modify the conditions placed on the respondent's release. *8 C.F.R. § 1236.1(d)(1); Matter of Garcia-Garcia, 25 I&N Dec. 93 (BIA 2009)*. These requests often involve DHS decisions to place an alien on an ankle bracelet monitor, but may involve other conditions placed on the Respondent's release like reporting requirements.

# When May ICE Revoke a Bond That Was Determined By ICE or Redetermined By the IJ?

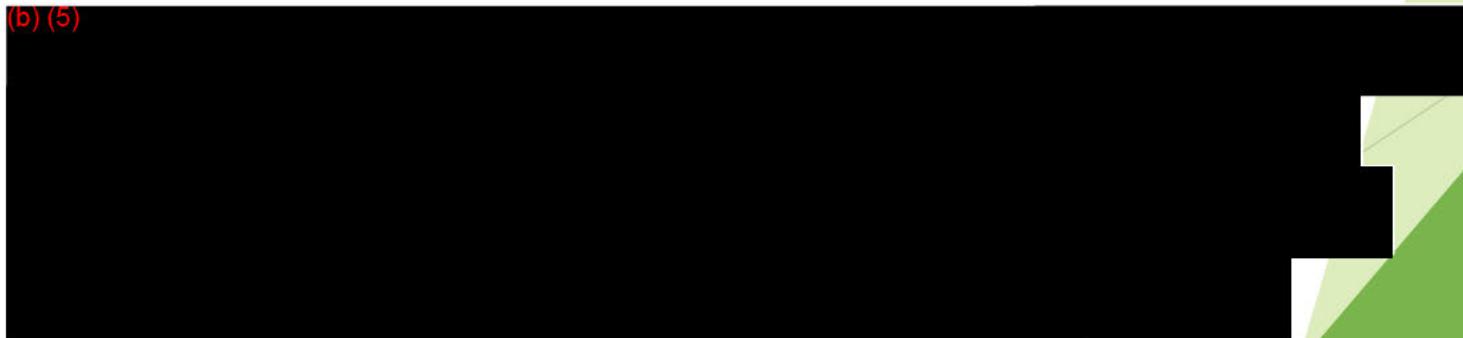
- At any time if there has been a change of circumstances. 8 C.F.R. § 1236.1(c)(9). Typical circumstances include an alien's arrest on criminal charges or suspicion of gang involvement.
- Alien has the right to seek review of the redetermination before the Immigration Judge.

# Prolonged Detention

- ▶ “A statute permitting indefinite detention of an alien would raise a serious constitutional problem.”
  - *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).



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# Prolonged Detention



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## Special Concerns: Mentally Incompetent

*Franco-Gonzalez v. Holder*, No. 10-02211, 2013 WL 3674492, at \*10-13 (C.D.Cal. Apr. 23, 2013) (Mentally Incompetent): Ninth Circuit held that a class of mentally incompetent non-citizens who are detained under INA §§ 235(b), 236, and 241 are entitled to bond hearings after six months of detention. DHS must prove “by clear and convincing evidence” that an alien is a flight risk or a danger to the community to justify denial of bond.

# Special Concerns: Juveniles

- ▶ ***Flores Hearings (Juveniles)***: On July 5, 2017, the Ninth Circuit issued a decision affirming the Central District of California's Order that the Government was in breach of the *Flores Settlement Agreement*. *Flores v. Sessions*, No. 17-55208, 2017 WL 2855813 (9th Cir. July 5, 2017); Order re Pls' Mot. to Enforce, *Flores v. Sessions*, 2:85-cv-04544 (C.D. Cal. Jan. 20, 2017). As a result, EOIR must make bond hearings available, nationwide, to (1) children in the custody of ORR at a staff-secure or secure facility; and (2) pursuant to discussions with counsel, any other child in ORR custody who affirmatively requests a bond hearing with ORR or before the immigration court. **See EOIR website for guidance in handling these proceedings.** Request briefing from the parties as needed.



Bond Hypotheticals  
New IJ Training

1. Jose Fabregas is a 28 year old from Mexico. He has been in the United States for two years. He has two U.S.C. children under the age of five with a woman he is not married to; she is also without status. He works in construction; he has never paid taxes. He was driving his employer's truck with the employer's permission. He was picked up pursuant to a New Jersey Attorney General's directive at a traffic stop in Morristown, N.J., where the police routinely set up roadblocks to check for DWI and registration issues. He has had no other driving infractions. He has no criminal or driving record. He has a valid Pennsylvania driver's license, but he never actually lived in Pennsylvania. He has five family members in New Jersey, all living in the same town as he does – all without status. His priest has come to court on his behalf at his bond hearing.
2. Violetta Parra is a 45-year old woman from Peru. She overstayed her visa by two years. Her daughter has LPR status and is living in Manhattan. Ms. Parra is afraid to return to Peru because of her abusive husband who is a retired police officer.
3. Karim Bey is a 24-year old Turkish man. He lied to U.S. consular officials to get a student visa. He never attended school in the U.S. He has no family in the U.S. He has no fear of return to Turkey. He was apprehended by ICE while working at a gas station.
4. Mohammed Ishpahani is a 36-year old Pakistani man. He has been in the U.S. for eight years. He left on advance parole due to a pending LULAC application. Upon return from Pakistan, he was detained at JFK Airport. USCIS denied his LULAC application four days after he arrived back in the U.S. and he was sitting in administrative detention in Elizabeth, N.J. Technically, at the time of his arrival his advance parole was still good. Is he entitled to bond?
5. Mario Vargas Llosa is from Honduras. He entered EWI through Arizona in 1995. He is 30 years old. His parents live in the U.S. and are LPRs. His father has diabetes and has had his leg amputated. He has USC sister. He has a wife who has no status and two USC children, one of whom is in the gifted and talented program at the public school in his town. Mr. Vargas Llosa supports the family. Mr. Vargas Llosa works for a factory in the county and has paid taxes for four years. His sister is in court to testify on his behalf.
6. Mei Lu Wan is a Chinese woman who claims to be 23 years old. She has no identity documents. She claims that she was kidnapped from her home in Fuzhou City and smuggled into the U.S. through Canada about three years ago. She has a tattoo of a bird on her right arm, which the DHS attorney is convinced is a gang marking. She was apprehended by ICE at a massage parlor. She was the person working the cash register.
7. Oskar Grass is a 47-year old man from Tajikistan. He entered the U.S. with a tourist visa five years ago and has overstayed. He has made no affirmative asylum filing. He fears return to his country because he claims he is a "Volga German", that his country has gotten very xenophobic since the break-up of the USSR, and that any person who is not a Tajik is persecuted on sight. He is married to a U.S.C. who filed but withdrew a Form I-130 (Petition for Alien Relative) for him. He and his wife had a fight where the local police had to come and break it up. The respondent was put in jail overnight but was released the next day with no charges. His wife

wrote a letter to DHS urging that they “send that monster to hell.”

8. Angel Rafael is a 31-year old Guatemalan man. He was picked up when ICE raided a restaurant where he was working in the kitchen. He had been arrested months earlier by the local police for shoplifting. He applied for and was accepted into the state pretrial intervention program in the county in which he lives; he has made no plea of guilt, but has been complying with probation. He has not missed a single probation appointment. He has been going to AA and has stopped drinking. His job at the restaurant was actually obtained through a Work First incentive through the Governor’s office to help the immigrant community integrate into American society. The local press is following his immigration case and is writing a series of articles on how the system fails people who are striving to achieve the American Dream. His probation officer and the press reporter are in court.
9. Sukwinder Singh is a 55-year-old Indian man. He entered illegally through Canada in 1985 after fleeing Mumbai because the police were arresting all Sikhs following the assassination of Indira Gandhi. His brother was beaten and set on fire by the police. He has never filed for any status or relief. He owns a taxi. He had a lawfully issued N.J. driver’s license but has not been able to renew it since 2001. He has no family in the U.S. but owns a house in Linden and rents out rooms to other Sikhs who all call him Uncle.
10. Viad Tepes is an Albania from Kosovo. He entered the U.S. in 2005 with his cousin’s visa through Newark Airport after taking a few trains to Munich and flying out from there. He married a U.S.C. last year. She has an Order of Protection against him from Superior Court, Family Part. He has violated the Order twice, but has only been placed in municipal jail overnight and then released.
11. Gunga Tenzin has a Nepalese passport. He claims to be Tibetan. He entered the U.S. with his Nepalese passport and a U.S. visa through JFK Airport last year. He made an affirmative asylum claim that was denied. He is a cook at Tibet House in NYC. He has an affidavit from Robert Thurman, Ph. D., director of Tibet House purporting to guarantee bond.
12. Miguel Puentes is a 41-year old man from Mexico. He entered EWI about 12 years ago. His NTA is dated two weeks ago and two days ago, he married his long-time companion, a U.S.C. woman with a 20-year-old son. The 20-year-old son is in a drug rehabilitation center; the rehab is being paid through the insurance plan that is part of his job. He has a job as a machinist at an assembly plant. He obtained his job using a fake LPR documents and a fraudulent social security card, but he has been using the fraudulent social security card to pay his federal income taxes. He has paid taxes on time for the last seven years. He has no criminal record and his employer has written a recommendation for him. He has no other family in the U.S.
13. Mathieu Salmon-Barbieu is a 27-year-old man from Ghana. He came to the US with fraudulent documents twelve years ago. After turning 21, he filed an affirmative asylum claim based on his fear of return to Ghana because he is a gay man. He had a wife in Ghana to whom he was married in a tribal ceremony (no legal ceremony) when he was 14 years old. He never lived with her. He was whipped by tribal elders for having male pornography and was cast out of his tribe. His sympathetic uncle helped him to go to South Africa where he then purchased papers to come

to the U.S. His asylum claim was denied and he never appealed the denial. He has since been married to a U.S.C. in Massachusetts, another man. They reside in New Jersey, which has a civil union law that recognized same-sex marriages from other places. They have two children, biologically fathered by respondent's partner because the respondent is incapable of fathering children since the whipping incident. Respondent is in the process of adopting the children. He is a stay-at-home dad.

14. Raimond Degas is an El Salvadorian man who is 26 years old. He has a juvenile record of theft and misdemeanors, but no adult charges. He was apprehended when ICE officers arrested everyone in his boarding house at 4 am. He has no family in the U.S. He thinks he has been here eight maybe nine years, but he is not sure.
15. Niklas Kretowicz was arrested while sitting in a parked car drinking beer. He is a 50-year old Polish man. He came to the U.S. on a tourist visa, got a job laying tile, and never left. He was completely drunk and singing at the top of his lungs when apprehended. The car was not turned on and the keys were in Mr. Kretowicz's jacket in the back seat. Nevertheless, he has been charged with DWI and has not had his municipal court trial yet. He has a lawyer for the DWI, but not for the immigration case.
16. Pilar Agosin is from Ecuador. She is 42-years old and has three children who are all in the U.S. illegally. She was abandoned by her husband many years ago. She and her children entered EWI about eight years ago. She was detained waiting for her daughter at Newark Airport. Her daughter was returning to New Jersey from Florida. Ms. Agosin has a pending products liability lawsuit in Superior Court, because she lost her left hand in an incident involving a commercial mixing bowl with an alleged design defect. She also has already won some workers' compensation money and knows if she wishes she can keep reopening that case to get more money. She is in court with her products liability lawyer who has never been in immigration court before and has made a motion for summary judgment based on racial profiling at the airport.
17. Bella Braddock is a 28-year old woman from Guyana. She first came to the U.S. in 1995 on a B-2 visa. She has had LPR status since 2000 due to her marriage to a U.S.C. They have since divorced. She was convicted of retail theft in Superior Court in 2004, and was sentenced to a jail term of five days (time served) and two years of probation. Both of her parents are LPRs and her two siblings are U.S.C.s. Last month, she was arrested in her town for a domestic violence incident with her boyfriend. She and her boyfriend have lived together for five years. Criminal charges were not formally filed against her.

## Bond/Custody

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## BOND AND CUSTODY HEARINGS

### I. OVERVIEW

## **A. APPLICATION BEFORE AN IMMIGRATION JUDGE**

The controlling provisions for bond/custody redetermination hearings before an Immigration Judge are found at INA § 236; 8 C.F.R. §§ 1003.19 and 1236.1 (2006). The bond hearing is separate and apart from, and shall form no part of the removal hearings. 8 C.F.R. § 1003.19(d) (2006). The application for a bond redetermination hearing is made to one of the following offices, in the following order prescribed at 8 C.F.R. § 1003.19 (2006):

1. If the alien is detained, to the Immigration Court that has jurisdiction over the place of detention. Note: the filing of a charging document is not a prerequisite to bond hearing jurisdiction. See Matter of Sanchez, 20 I&N Dec. 223, 225 (BIA 1990);
2. To the Immigration Court that has administrative control over the case. See 8 C.F.R. § 1003.13 (2006); or,
3. To the Office of the Chief Immigration Judge (OCIJ) for designation of the appropriate Immigration Court to accept and hear the application.

## **B. TIME**

1. After the DHS makes its initial custody determination, and
2. Before an administratively final order of deportation or removal. 8 C.F.R. §§ 1236.1, 1003.19 (2006); Matter of Valles, 21 I&N Dec. 769, 771 (BIA 1997); Matter of Uluocha, 20 I&N Dec. 133, 134 (BIA 1989); Matter of Sio, 18 I&N Dec. 176, 177 (BIA 1981); Matter of Vea, 18 I&N Dec. 171, 173 (BIA 1981).

## **C. SUBSEQUENT HEARING**

The Immigration Judge may conduct a subsequent custody hearing so long as the request is made in writing and based on a showing that the alien's circumstances have changed materially since the initial bond redetermination hearing. 8 C.F.R. § 1003.19(e) (2006); Matter of Uluocha, 20 I&N Dec. 133 (BIA 1989).

## **D. WHILE A BOND APPEAL IS PENDING**

When appropriate, an Immigration Judge may entertain a bond redetermination request, even when a previous bond redetermination by the Immigration Judge has been appealed to the Board of Immigration Appeals (BIA). Matter of Valles, 21 I&N Dec. 769 (BIA 1997). If a bond redetermination request is granted by an Immigration Judge while a bond appeal is pending with the BIA, the appeal is rendered moot. Id. If an Immigration Judge declines to change the amount or conditions of bond, the DHS must notify the BIA in writing, with proof of service on the opposing party, within 30 days, if it wishes to pursue its original bond appeal. Id.

## **E. NON-MANDATORY CUSTODY ALIENS**

1. Neither section 236(a) of the Act nor the applicable regulations confer on the alien the right to release on bond. *In re D-J-*, 23 I&N Dec. 572 (A.G. 2003). The denial of a respondent's release on bond does not violate international law. *Id.*
2. For non-mandatory custody aliens, the Act provides that Immigration Judges may: "(1) continue to detain the arrested alien; [or] (2) may release the alien on— (A) bond of at least \$1,500 . . . ; or (B) conditional parole . . . ." INA § 236(a). One federal district court has held that that Immigration Judges have authority under INA § 236(a) to grant release on conditional parole, including release on recognizance, instead of imposing monetary bond. *See Rivera v. Holder*, 307 F.R.D. 539 (W.D. Wash. 2015) (ruling that Immigration Judges in Washington state conducting bond hearings under INA § 236(a) must consider whether to grant an alien's request for release on conditional parole, including release on recognizance, in lieu of release on monetary bond).
3. Under BIA case law addressing general bond provisions of prior law, an alien ordinarily would not be detained unless he or she presented a threat to national security or a risk of flight. See *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976). By virtue of 8 C.F.R. § 1236.1(c)(8) (2006), a criminal alien must demonstrate that he is not a threat to the national security, that his release would not pose a danger to property or persons, and that he is likely to appear for any future proceedings. *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006); *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999). But see *In re D-J-*, 23 I&N Dec. 572 (A.G. 2003).
4. Juveniles (i.e., under 18) have special conditions of release. See 8 C.F.R. § 1236.3 (2006).

a. Juveniles, in addition to having monetary bond, will have conditions of release in that they can only be released, in order of preference, to :

- i. a parent,
- ii legal guardian, or
- iii. adult relative.

b. The regulation governing juvenile conditions of release is quite detailed and specific. There is no authority for the Immigration Judge to fashion independent conditions of release. See also *In Re Mejia-Andino*, 23 I&N Dec. 533 (BIA 2002); *Matter of Amaya*, 21 I&N Dec. 583 (BIA 1996).

## F. MANDATORY CUSTODY ALIENS

1. The Immigration Court has no bond/custody redetermination authority over those aliens defined in section 236(c)(1) of the Act unless it falls within the enumerated exception. The exception provides that the alien may be released if it is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or to protect an immediate family member of such witness. The alien must satisfy the Attorney General that he or she will not pose a danger to the safety of other persons or of property and is likely to appear for hearings.

2. However, an alien may request a hearing before an Immigration Judge to contest the INS determination that he or she is subject to mandatory detention under section 236(c)(1) of the Act. See 8 C.F.R. §§ 1003.19(h)(1)(ii), 1003.19(h)(2)(ii) (2006).

3. An alien is not subject to mandatory detention under section 236(c) of the Act if he was released from his non-Service custodial setting on or before October 1998, the expiration date of the Transition Period Custody Rules. Matter of Adeniji, 22 I&N Dec. 1102 (BIA 1999).

4. Section 236(c)(1) of the Act provides that the Attorney General shall take into custody any alien when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense, who-

a. Is inadmissible by reason of having committed any offense covered in section 212(a)(2) of the Act. This includes:

Conviction or sufficient admission of CIMT

Conviction of controlled substance violation

Multiple criminal convictions with aggregate sentences of 5 years

Controlled substance traffickers and certain immediate relatives

Prostitution and commercialized vice

Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Foreign government officials who have engaged in particularly severe violations of religious freedom.

b. Is deportable by reason of having committed any offense in section 237(a)(2)(A)(ii) [two or more CIMTs], (A)(iii) [Conviction of aggravated felony], (B) [Conviction of controlled substance violation; drug abusers and addicts], (C) [Conviction of firearms offense], or (D) [Certain enumerated convictions].

c. Is deportable under section 237(a)(2)(A)(i) [CIMT] on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or

d. Is inadmissible under section 212(a)(3)(B) of the Act or deportable under section 237(a)(4)(B) of the Act [Terrorist activity].

5. Where the District Director has denied the alien's request for release or has set a bond of \$10,000 or more, any order of the Immigration Judge authorizing release shall be stayed upon the Service's filing of Form EOIR-43 with the Immigration Court on the day the order is issued,

and the decision shall be held in abeyance pending decision on the appeal by the BIA. 8 C.F.R. § 1003.19(i)(2) (2006); Matter of Joseph, 22 I&N Dec. 660 (BIA 1999), clarified, Matter of Joseph, 22 I&N Dec. 799 (BIA 1999).

#### G. WHEN AN IMMIGRATION JUDGE MAY NOT REDETERMINE CUSTODY STATUS:

1. On the Judge's own motion. Matter of P-C-M-, 20 I&N Dec. 432 (BIA 1991). The application must be made by the alien or the alien's counsel or representative. 8 C.F.R. § 1003.19(b) (2006).
2. If the alien is not in DHS custody (e.g., alien is in state custody). Matter of Sanchez, 20 I&N Dec. 223 (BIA 1990).
3. If more than 7 days have elapsed since the alien was released from DHS custody. 8 C.F.R. § 1236.1(d) (2006); Matter of Valles, 21 I&N Dec. 769 (BIA 1997); Matter of Daryoush, 18 I&N Dec. 352 (BIA 1982); Matter of Sio, 18 I&N Dec. 176, 177 (BIA 1981); Matter of Vea, 18 I&N Dec. 171, 173 (BIA 1981). After the expiration of the 7-day period the respondent may request review by the District Director. 8 C.F.R. § 1236.1(d)(2) (2006).
4. The following aliens have no recourse to the Immigration Court for bond hearing:
  - a. The arriving alien in removal proceedings, including aliens paroled after arrival under section 212(d)(5) of the Act;
  - b. The alien in claimed status proceedings;
  - c. The alien in credible fear proceedings;
  - d. The alien in exclusion proceedings;
  - e. The alien in summary removal proceedings.
- f. An aggravated felon alien in expedited removal proceedings under section 238 of the Act.
5. Neither an Immigration Judge nor the BIA has authority to adjudicate parole matters. Matter of Oseiwsu, 22 I&N Dec. 19 (BIA 1998); Matter of Matelot, 18 I&N Dec. 334, 336 (BIA 1982); Matter of Castellon, 17 I&N Dec. 616 (1981). A returning permanent resident alien is regarded as an "arriving alien" seeking admission if he falls within one of the following categories of section 101(a)(13)(C) of the Act:
  - a. has abandoned or relinquished that status;
  - b. has been absent from the United States for a continuous period in excess of 180 days;
  - c. has engaged in illegal activity after having departed the United States;

- d. has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under the INA and extradition proceedings;
  - e. has committed an offense identified in section 212(a)(2) of the Act, unless since such offense the alien has been granted relief under sections 212(h) or 240A(a) of the Act, or;
  - f. is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.
6. If the alien has an administratively final order of removal or deportation. INA § 241; 8 C.F.R. § 1236.1(d)(1) (2006); Matter of Valles, 21 I&N Dec. 769, 771 (BIA 1997); Matter of Uluocha, 20 I&N Dec. 133, 134 (BIA 1989); Matter of Sio, 18 I&N Dec. 176, 177 (BIA 1981); Matter of Vea, 18 I&N Dec. 171, 173 (BIA 1981). After an order becomes administratively final, the respondent may seek BIA review of the District Director's or Immigration Judge's custody determination. 8 C.F.R. § 1236.1(d)(3) (2006).

## H. SIGNIFICANT FACTORS IN A BOND DETERMINATION

- 1. Fixed address in the United States. Matter of Guerra, 24 I&N Dec. 37 (BIA 2006); Matter of Patel, 15 I&N Dec. 666 (BIA 1979).
- 2. Length of residence in the United States. Matter of Guerra, 24 I&N Dec. 37 (BIA 2006); Matter of Andrade, 19 I&N Dec. 488 (BIA 1987); Matter of Shaw, 17 I&N Dec. 177 (BIA 1979).
- 3. Family ties in the United States, particularly those who can confer immigration benefits on the alien. Matter of Guerra, 24 I&N Dec. 37 (BIA 2006); Matter of Andrade, 19 I&N Dec. 488 (BIA 1987); Matter of Shaw, 17 I&N Dec. 177 (BIA 1979); Matter of Patel, 15 I&N Dec. 666 (BIA 1979).
- 4. Employment history in the United States, including length and stability. Matter of Guerra, 24 I&N Dec. 37 (BIA 2006); Matter of Andrade, 19 I&N Dec. 488 (BIA 1987); Matter of Shaw, 17 I&N Dec. 177 (BIA 1979); Matter of Patel, 15 I&N Dec. 666 (BIA 1979).
- 5. Immigration Record. Matter of Guerra, 24 I&N Dec. 37 (BIA 2006); Matter of Andrade, 19 I&N Dec. 488 (BIA 1987); Matter of Shaw, 17 I&N Dec. 177 (BIA 1979); Matter of San Martin, 15 I&N Dec. 167 (BIA 1974); Matter of Moise, 12 I&N Dec. 102 (BIA 1967).
- 6. Attempts to escape from authorities or other flight to avoid prosecution. Matter of Guerra, 24 I&N Dec. 37 (BIA 2006); Matter of Patel, 15 I&N Dec. 666 (BIA 1979); Matter of San Martin, 15 I&N Dec. 167 (BIA 1974).

7. Prior failures to appear for scheduled court proceedings. Matter of Guerra, 24 I&N Dec. 37 (BIA 2006); Matter of Andrade, 19 I&N Dec. 488 (BIA 1987); Matter of Shaw, 17 I&N Dec. 177 (BIA 1979); Matter of Patel, 15 I&N Dec. 666 (BIA 1979); Matter of San Martin, 15 I&N Dec. 167 (BIA 1974).
8. Criminal record, including extensiveness and recency, indicating consistent disrespect for the law and ineligibility for relief from deportation/removal. Matter of Guerra, 24 I&N Dec. 37 (BIA 2006); Matter of Andrade, 19 I&N Dec. 488 (BIA 1987).

## I. LESS SIGNIFICANT FACTORS IN A BOND DETERMINATION

1. Early release from prison, parole, or low bond in related criminal proceedings. Matter of Andrade, 19 I&N Dec. 488 (BIA 1987); Matter of Shaw, I&N Dec. 177 (BIA 1979).
2. Ability to pay is not dispositive.
3. DHS difficulties in executing a final order of deportation. Matter of P-C-M, 20 I&N Dec. 432 (BIA 1991).

## II CASE CITATIONS--QUICK REFERENCE

Matter of Kotliar, 24 I&N Dec. 124 (BIA 2007). An alien who has been apprehended at home while on probation for criminal convictions is subject to mandatory detention under section 236 (c)(1) of the Act, regardless of the reason for the most recent criminal custody. The only proviso is that it must be ascertained that the alien was released from custody after October 8, 1998, which was the expiration date of the Transitional Period Custody Rules. An alien need not be charged with a ground that provides for mandatory detention.

Matter of Guerra, 24 I&N Dec. 37 (BIA 2006). In a custody redetermination under section 236(a) of the Act, where an alien must establish to the satisfaction of the IJ that the alien does not present a danger to others, a threat to national security, or a flight risk, the IJ has wide discretion in deciding the factors that may be considered. In deciding whether an alien is a danger to others, the IJ may consider evidence that the alien was criminally charged in an alleged controlled substance trafficking scheme, even if the alien was not convicted of a criminal offense.

Matter of X-K, 23 I&N Dec. 731 (BIA 2005). An alien who is initially screened for expedited removal under section 235(b)(1)(A) of the Act as a member of the class of aliens designated pursuant to the authority in section 235(b)(1)(A)(iii) of the Act, but who is subsequently placed in removal proceedings under section 240 of the Act following a positive credible fear determination, is eligible for a custody redetermination hearing before an IJ unless the alien is a member of any of the listed classes of aliens who are specifically excluded from the custody jurisdiction of IJs pursuant to federal regulation.

Matter of D-J-, 23 I&N Dec. 572 (A.G. 2003). Neither section 236(a) of the Act nor the applicable regulations confer on an alien the right to release on bond. In determining whether to release on bond undocumented migrants who arrive in the U.S. by sea seeking to evade inspection, it is appropriate to consider national security interests implicated by the encouragement of further unlawful mass migrations and the release of undocumented alien migrants into the U.S. without adequate screening. In bond proceedings involving aliens seeking to enter the U.S. illegally, where the Government offers evidence from sources in the Executive Branch with relevant expertise establishing that significant national security interests are implicated, IJs and the BIA shall consider such interests. Considering national security grounds applicable to a category of aliens in denying an unadmitted alien's request for release on bond does not violate any due process right to an individualized determination in bond proceedings under section 236(a) of the Act.

Matter of Rojas, 23 I&N Dec. 117 (BIA 2001). A criminal alien who is released from criminal custody after the expiration of the Transition Period Custody Rules is subject to mandatory detention pursuant to section 236(c) of the Act even if the alien is not immediately taken into custody by INS or DHS authorities when released from incarceration.

Matter of West, 22 I&N Dec. 1405 (BIA 2000). The mandatory detention provisions of section 236(c) of the Act do not apply to an alien who was convicted after the expiration of the Transition Period Custody Rules ("Transition Rules"), but who was last released from the physical custody of state authorities prior to the expiration of the Transition Rules and who was not physically confined or restrained as a result of that conviction.

Matter of Saelee, 22 I&N Dec. 1258 (BIA 1999). The BIA has jurisdiction over an appeal from a district director's custody determination that was made after the entry of a final order of deportation or removal under 8 C.F.R. § 236.1 (1999). An alien subject to a final order of deportation based on a conviction for an aggravated felony, who is unable to be deported, may be eligible for release from detention after the expiration of the removal period pursuant to section 241(a)(6) of the Act.

Matter of Adeniji, 22 I&N Dec. 1102 (BIA 1999). Section 236(c) of the Act does not apply to aliens whose most recent release from non-Service custody occurred prior to October 9, 1998. A criminal alien seeking custody redetermination under section 236(a) of the Act must show he or she does not present a danger to property or persons. It is the responsibility of the Immigration Judge and parties to ensure the bond record establishes the nature and substance of the specific factual information considered in reaching the bond determination.

Matter of Joseph, 22 I&N Dec. 799 (BIA 1999). The requisite "reason to believe" that allows the INS to claim a respondent is subject to the mandatory detention for purposes of the automatic stay is not sufficient for the merits of the bond appeal. Matter of Joseph, 22 I&N Dec. 660 (BIA 1999), clarified. For purposes of determining the custody conditions of a lawful permanent resident under section 236(c) of the Act, a lawful permanent resident will not be considered "properly included" in a mandatory detention category when an Immigration Judge or the BIA finds it is substantially unlikely that the INS will prevail on a charge of removability specified under section 236(c)(1) of Act.

Matter of Joseph, 22 I&N Dec. 660 (BIA 1999). The filing of a Form EOIR-43 (Notice of Intent to Appeal Custody Redetermination) provides an automatic stay of an IJ's order releasing an alien who is charged with removal under one of the mandatory detention grounds set forth in section 236(c)(1) of the Act, even where the IJ has determined that an alien is not subject to section 236(c)(1) of the Act and has terminated the removal proceedings on that charge. The filing of an appeal from an Immigration Judge's merits decision terminating removal proceedings does not operate to stay the Judge's release order in related bond proceedings. Matter of Valles, 21 I&N Dec. 769 (BIA 1997), modified.

Matter of Oseiwusu, 22 I&N Dec. 19 (BIA 1998). An Immigration Judge has no authority over the apprehension, custody, and detention of arriving aliens and is therefore without authority to consider the bond request of an alien returning pursuant to a grant of advance parole.

Matter of Collado, 21 I&N Dec. 1061 (BIA 1998). A returning lawful permanent resident cannot use the Fleuti doctrine to seek admission to the United States. The alien must be admissible to the United States. Matter of Ellis, 20 I&N Dec. 641 (1993), distinguished.

Matter of Melo, 21 I&N Dec. 883 (BIA 1997). In bond proceedings under the Transition Period Custody Rules, the standards set forth in Matter of Drysdale, 20 I&N Dec. 815 (BIA 1994), apply to the determinations of whether the alien's release pending deportation proceedings will pose a danger to the safety of persons or of property and whether he or she is likely to appear for any scheduled proceeding. The "in deportable" language as used in the Transition Period Custody Rules does not require that an alien have been charged and found deportable on that deportation ground.

Matter of Valles, 21 I&N Dec. 769 (BIA 1997). An Immigration Judge maintains continuing jurisdiction to entertain bond redetermination requests by an alien even after the timely filing of an appeal with the BIA from a previous bond redetermination request.

Matter of Valdez, 21 I&N Dec. 703 (BIA 1997). The Transition Period Custody Rules invoked October 9, 1996, govern bond redeterminations of aliens falling within the nonaggravated felony criminal grounds of deportation covered in those rules, regardless of when the criminal offenses and convictions occurred. The Transition Period Custody Rules govern bond redetermination appeals of otherwise covered criminal aliens who are not now in custody by virtue of immigration bond rulings rendered prior to the October 9, invocation of those rules.

Matter of Noble, 21 I&N Dec. 672 (BIA 1997). Bond redeterminations of detained deportable aliens convicted of an aggravated felony are governed by the Transition Period Custody Rules irrespective of how or when the alien came into immigration custody.

Matter of Khalifah, 21 I&N Dec. 107 (BIA 1995). An alien subject to criminal proceedings for alleged terrorist activities in the country to which the INS seeks to deport him is appropriately ordered detained without bond as a poor bail risk.

Matter of Drysdale, 20 I&N Dec. 815 (BIA 1994). An aggravated felon must pass a two-step analysis for an aggravated felon to overcome the rebuttable presumption against his release. One, that he is not a threat to the community, and two, that he is not likely to abscond.

Matter of Ellis, 20 I&N Dec. 641 (BIA 1993). In bond proceedings governed by section 242(a)(2)(B) of the Act, the alien bears the burden of showing that he is lawfully admitted to the United States, not a threat to the community, and likely to appear before any scheduled hearings.

Matter of P-C-M-, 20 I&N Dec. 432 (BIA 1991). An Immigration Judge may not redetermine custody status on his own motion, only upon application by respondent or his representative.

Matter of De la Cruz, 20 I&N Dec. 346 (BIA 1991), modified, Matter of Ellis, 20 I&N Dec. 641 (BIA 1993). There is a presumption against the release of any alien from Service custody convicted of an aggravated felony unless the alien demonstrates certain factors. See also Matter of Yeung, 21 I&N Dec. 610 (BIA 1996).

Matter of Sanchez, 20 I&N Dec. 223 (BIA 1990). It is not proper for an Immigration Judge to make a custody determination under 8 C.F.R. § 242.2(c) (1990) unless INS has custody of the respondent. A respondent who is in the custody of a state or agency other than the INS is not in the custody of INS.

Matter of Eden, 20 I&N Dec. 209 (BIA 1990). An alien convicted of an aggravated felony is subject to detention under section 242(a)(2) of the Act upon completion of the incarceration or confinement ordered by the court for such conviction.

Matter of Uluocha, 20 I&N Dec. 133 (BIA 1989) Immigration Judges may further consider requests to modify bonds by detained aliens without a formal motion to reopen. Such requests should be considered on the merits. However, if there are no changed circumstances shown, the Immigration Judge may decline to change the prior bond decision.

Matter of Andrade, 19 I&N Dec. 488 (BIA 1987). Case includes factors to consider and effect of early releases on parole.

Matter of Sugay, 17 I&N Dec. 637 (BIA 1981). Factors to consider when analyzing a bond case include employment history; length of residence in community; family ties; record of nonappearance; criminal violations; immigration violations; and eligibility for relief.

Matter of Shaw, 17 I&N Dec. 177 (BIA 1979). Factors to consider in a bond case include the manner of entering; community ties; criminal arrest and characteristics; state criminal bond amount; and family ties.

Matter of Chirinos, 16 I&N Dec. 276 (BIA 1977). A bond hearing is a hearing separate and apart from other proceedings. The hearing is informal and there is no right to a transcript. The record may contain any information in addition to the memorandum of decision and other EOIR forms.

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
NORTHWEST DETENTION CENTER  
IMMIGRATION COURT  
TACOMA, WASHINGTON

In the Matter of:

XXXXXXXXXXXXXXXXXXXX,

Respondent

File Number: AXXX XXX XXX

In Bond Proceedings

Application: Bond Re-determination

On Behalf of the Respondent  
XXXXXXXXXXXX, Esq.  
XXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXX

On Behalf of DHS  
XXXXXXXXXX, Esq.  
Assistant Chief Counsel  
Department of Homeland Security  
Immigration and Customs Enforcement  
1623 East J Street, Suite 2  
Tacoma, Washington 98421

**Memorandum of the Immigration Judge**

The Court conducted a bond re-determination hearing on [Date], and denied Respondent's request for bond finding. Respondent posed a danger to the community. Respondent was represented by counsel during his bond proceedings. Respondent is charged in the Notice to Appear as being removable from the United States under section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("Act" or INA) as an alien present in the United States without admission or parole.

Under the regulations, the respondent carries the burden of demonstrating: (1) he is not a danger to the community; and (2) he is not a flight risk. 8 C.F.R. § 1236.1(c)(8); *see also Matter of Urena*, 25 I&N Dec. 140 (BIA 2009). Relying on *Carlson v. Landon*, 342 U.S. 524 (1952)

(holding that denial of bail to an alien will be overruled only where it is shown to be “without a reasonable foundation”). The BIA stated there is no limitation on the discretionary factors that an Immigration Judge may consider when ruling on custody and bond issues. *See Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006). An Immigration Judge may consider various factors when setting bond such as: the respondent’s immigration history, criminal record, family ties in the United States, employment history, and length of time in the United States. *Id.* at 39; *see also Matter of Andrade*, 19 I&N Dec. 488, 489-90 (BIA 1987) (listing factors, including whether the alien has potential relief from removal, for consideration in a bond hearing). If the court determines that the respondent is not a danger to the community, the court should then assess the respondent’s potential risk of flight. *Id.*

In this case, Respondent is a XX-year-old citizen of [country] who last entered the United States without inspection in 2003. Bond Exh. B-1. He is married. Respondent has two United States citizen children of his own and two United States citizen step-children. Respondent’s spouse suffers from Post-Traumatic Stress Syndrome (PTSD) and is the recipient of a U-visa. He is eligible to adjust his status in 2015. Respondent has applied for derivative status under his spouse’s U-visa. Respondent’s children and step-children are in good health and have no educational issues. Respondent intends to seek cancellation of removal under INA § 240A(b)(1).

Respondent filed an evidence package in support of his bond request. Bond Exh. B-2. Respondent’s bond evidence includes (1) conviction records from Respondent’s 2013 drunk driving conviction; (2) documents relating to Respondent’s application for derivative U-visa status and his spouse’s U-visa; (3) numerous letters of support from his family, friends, and work supervisors; (4) birth records for Respondent’s children and step-children; (5) declarations from

Respondent and his spouse; and (6) a letter from a victim advocate involved in Respondent's spouse's abuse case. *See id.*

Respondent was apprehended by immigration officers on [date], at the [name and location of jail], where he was being held on charges of Driving Under the Influence and Reckless Driving. Bond Exh. B-1. Respondent was convicted of both charges and was sentenced to 15 days in jail on each charge. *Id.* Respondent has previously been convicted of Driving Under the Influence (DUI) on two prior occasions; once in 2005 and once in 2006. *Id.* Respondent is required to complete alcohol evaluation and treatment as a condition of his probation for his most recent DUI. *See* Bond Exh. B-2.

Respondent has been convicted of DUI three times in the last eight years. He has also been convicted of driving recklessly while intoxicated. Respondent has demonstrated a pattern of dangerous and irresponsible behavior that puts the public at risk. The Court therefore finds that Respondent presents a danger to the community and the Court denies Respondent's request for bond. *See Bagay v. United States*, 553 U.S. 137, 141 (2008) ("drunk driving is an extremely dangerous crime"); *Marmolejo-Campos v. Holder*, 558 F.3d 903, 913 (9th Cir. 2009) ("the dangers of drunk driving are well established").

### **ORDER**

The Respondent's motion for a custody re-determination is denied. The Respondent shall be held without bond.

Dated: \_\_\_\_\_

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XXXXXXXXXXXXXXXX  
Immigration Judge

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
NORTHWEST DETENTION CENTER  
IMMIGRATION COURT  
TACOMA, WASHINGTON

In the Matter of:

XXXXXXXXXXXXXX,

Respondent

File Number: AXXX XXX XXX

In Bond Proceedings

Application: Bond Re-determination

On Behalf of the Respondent

XXXXXXXXXX, Esq.  
XXXXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXXXX

On Behalf of DHS

XXXXXXXXXXXX, Esq.  
Assistant Chief Counsel  
Department of Homeland Security  
Immigration and Customs Enforcement  
1623 East J Street, Suite 2  
Tacoma, Washington 98421

**Memorandum of the Immigration Judge**

The Court conducted a bond re-determination hearing on [date], and denied Respondent's request for bond, finding Respondent posed a danger to the community. Respondent was represented by counsel during his bond proceedings. Respondent first entered the United States 1995 without permission, but later adjusted his status to that of a lawful permanent resident. Bond Exh. B-1 at 2. He is charged in the Notice to Appear as being removable from the United States under section 237(a)(2)(E)(i) of the Immigration and Nationality Act ("Act" or INA) as an alien convicted of a crime of domestic violence after entry.

Under the regulations, the respondent carries the burden of demonstrating: (1) he is not a danger to the community; and (2) he is not a flight risk. 8 C.F.R. § 1236.1(c)(8); *see also Matter of Urena*, 25 I&N Dec. 140 (BIA 2009). Relying on *Carlson v. Landon*, 342 U.S. 524 (1952) (holding that denial of bail to an alien will be overruled only where it is shown to be “without a reasonable foundation”). The BIA stated there is no limitation on the discretionary factors that an Immigration Judge may consider when ruling on custody and bond issues. *See Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006). An Immigration Judge may consider various factors when setting bond such as: the respondent’s immigration history, criminal record, family ties in the United States, employment history, and length of time in the United States. *Id.* at 39; *see also Matter of Andrade*, 19 I&N Dec. 488, 489-90 (BIA 1987) (listing factors, including whether the alien has potential relief from removal, for consideration in a bond hearing). If the court determines that the respondent is not a danger to the community, the court should then assess the respondent’s potential risk of flight. *Id.*

In this case, Respondent is a 38-year-old native and citizen of Mexico. Bond Exh. B-2 at 1. According to the statements of Respondent’s counsel at the bond hearings, Respondent has significant community and family ties. Some of his family were present at Respondent’s bond hearing in his support. Other than Respondent’s recent conviction, he has no other criminal history in the United States. Respondent is married to a United States citizen. Respondent’s spouse was not the victim of the domestic violence charges. Respondent also has three United States citizen children ages 12, 9, and 5. Two of Respondent’s children were the victims of the domestic violence for which Respondent was convicted. There is currently a no-contact order in place between Respondent and his family. Respondent was arrested by the immigration officers when Respondent reported to the probation office as required after his conviction.

Respondent filed evidence in support of his request for bond. Bond Exh. B-2. This evidence included (1) numerous letters of support from friends, family, employers, and co-workers; (2) Respondent's pay and employment records. *Id.*

The Department of Homeland Security (DHS) also filed an evidence package at the bond hearing. Bond Exh. B-2. According to this evidence, Respondent was encountered by immigration officers at the [name and location of jail], on [date of encounter]. *Id.* at 2. On October 2, 2014, Respondent was convicted in Baker County, Oregon, for Assault in the Fourth Degree and Criminal Mistreatment in the First Degree, Domestic Violence. *Id.* at 5-13. Respondent was sentenced to serve 30 days in jail for each count (consecutive) and 36 months of probation. *Id.* According the police reports for Respondent's criminal case, Respondent choked his 12-year-old son. *Id.* at 22-27. Respondent's son told the police that when Respondent was choking him, he could not breathe and it hurt him. *Id.* Police officers who responded to the scene noted red marks on Respondent's son's neck that were consistent with having been choked. *Id.* They also observed abrasions on Respondent's son's arm. *Id.* Respondent's 9-year-old daughter reported to the police that Respondent had grabbed her by the arm and threw her across the room. *Id.* Police noted visible red marks on Respondent's daughter's upper left arm. *Id.* They also noted that her upper eye lid on her left eye was swollen. *Id.* She also told police that Respondent had hit her with a belt three weeks before and had left welts on her back. *Id.* Respondent's spouse also told the police that Respondent had been physically abuse towards her and he had recently started to abuse the children. *Id.*

Based on the evidence in the record, Respondent has engaged in violent behavior against his family, including his young children and his spouse. He has caused pain and injuries to his children and he has been convicted of assaulting his son and criminally mistreating his daughter.

Respondent has also been abusive to his spouse. “The volatility of situations involving domestic violence” makes them particularly dangerous. *United States v. Martinez*, 406 F.3d 1160, 1164 (9th Cir.2005); *Mattos v. Agarano*, 661 F.3d 433, 450 (9<sup>th</sup> Cir. 2011).

For these reasons, the Court finds Respondent presents a danger to the community and his request for a bond redetermination is denied.

**ORDER**

The Respondent’s motion for a custody re-determination is denied. The Respondent shall be held without bond.

Dated: \_\_\_\_\_

XXXXXXXXXXXXXX  
Immigration Judge